

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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4 UNITED STATES OF AMERICA, )  
5 ) CR14-00122-RSM  
6 Plaintiff, ) SEATTLE, WASHINGTON  
7 )  
8 v. ) July 31, 2014  
9 )  
10 MUSAB MOHAMMED MASMARI, ) Sentencing  
11 )  
12 Defendant. )

13  
14  
15 VERBATIM REPORT OF PROCEEDINGS  
16 BEFORE THE HONORABLE RICARDO S. MARTINEZ  
17 UNITED STATES DISTRICT JUDGE  
18

19 APPEARANCES:

20 For the Plaintiff: Todd Greenberg  
21 Assistant United States Attorney  
22 U.S. Attorney's Office  
23 700 Stewart Street, Suite 5220  
24 Seattle, Washington 98101  
25

For the Defendant: Charles D. Swift  
Swift & McDonald  
2003 Western Avenue  
Suite 330  
Seattle, WA 98121  
Jeffrey D. Cohen  
Law Offices of Jeffrey D. Cohen  
1325 4th Avenue  
Suite 1402  
Seattle, WA 98101

1 THE CLERK: This is the sentencing hearing in United  
2 States versus Musab Masmari, cause number CR14-122. Will  
3 counsel please rise and make their appearances for the  
4 record?

5 MR. GREENBERG: Your Honor, Todd Greenberg for the  
6 United States.

7 THE COURT: Mr. Greenberg.

8 MR. SWIFT: Good morning, Your Honor, Charles Swift  
9 and Jeff Cohen on behalf of Mr. Masmari. Also present with  
10 Mr. Masmari is --

11 THE INTERPRETER: Hiba Burtle, Your Honor, standby  
12 interpreter.

13 THE COURT: Could you spell your last name for our  
14 record?

15 THE INTERPRETER: "B" as in bravo, "U," "R" as in  
16 rabbit, "T" as in Tom, "L" as in lady, "E" as in echo.

17 THE COURT: Thank you very much.

18 MR. SWIFT: She will be on standby. Mr. Masmari has  
19 had significant English training, but if it moves fast or  
20 there are legal terms sometimes he has trouble following.  
21 But he's not going to ask to have translation unless he's not  
22 understanding what's going on.

23 THE COURT: No problem. Mr. Masmari, if at any point  
24 in time you don't understand, don't hesitate to use the  
25 services of our interpreter. Alright. You may be seated.

1 Counsel, let me indicate for you and for our record  
2 exactly what the court has received and had a chance to  
3 review prior to our scheduled hearing this morning.

4 The court has reviewed the plea agreement of the parties,  
5 the government's sentencing memorandum, the defendant's  
6 sentencing memorandum, the psychiatric report that was  
7 submitted, the statement of responsibility, and the court has  
8 reviewed at least one victim impact statement. And, finally,  
9 the court has reviewed the presentence report prepared by  
10 Senior U.S. Probation Officer Rick Cowan, who is also present  
11 with us this morning.

12 Trusting the parties have had that same opportunity to  
13 fully review all of these materials, Mr. Greenberg, if I  
14 could start with you, tell me what the government's  
15 recommendation is.

16 MR. GREENBERG: Thank you, Your Honor. Your Honor,  
17 we're recommending that the court impose a sentence in this  
18 case of 60 months, five years in federal prison. And that is  
19 a very serious, and it's a lengthy sentence that is warranted  
20 by the defendant's conduct in this case.

21 That sentence is first warranted because the offense  
22 itself was so serious and so dangerous. The defendant went  
23 to Neighbours Nightclub, a popular nightclub here on Capitol  
24 Hill, on New Year's Eve. The place was packed, it had  
25 approximately 750 patrons inside the club that night, some of

1     whom are here in the courtroom. He brought with him a can of  
2     gasoline. So this was not a spur-of-the-moment thing, it was  
3     a preplanned crime. He doused the stairs and lit them on  
4     fire, just minutes after midnight on New Year's Eve. And he,  
5     himself, made a quick escape from the club.

6             And eventually, a couple weeks later, he tried to make  
7     another escape, he tried to flee the country. But it was  
8     through a very, very thorough and successful investigation by  
9     the Seattle Police Department and the FBI that allowed them  
10    to solve this crime, identify Mr. Masmari as the perpetrator,  
11    and apprehend him as he was trying to flee.

12            But it wasn't just the police department and the FBI who  
13    solved this crime. This is one rare and I think impressive  
14    aspect of this case. It was also solved by some of the  
15    victims, some of the very people who were victimized by  
16    Mr. Masmari, assisted in identifying him, because there was  
17    video footage taken at the club, which was eventually  
18    released through the media seeking assistance in identifying  
19    the perpetrator . And that was successful. So a unique  
20    collaboration between the victims, the community, and law  
21    enforcement, in solving this terrible crime.

22            Another reason this sentence is appropriate, a five-year  
23    sentence, is that it actually presented a serious risk of  
24    injury and potentially even death. And this is not in  
25    dispute. The defendant has admitted this in the plea

1 agreement, he's agreed to the highest possible base offense  
2 level based on that. And but for the really, really  
3 responsible and impressive response to this event by the  
4 management of Neighbours, the staff at Neighbours, and by  
5 those 750 folks who were at Neighbours, this could have been  
6 a lot worse. And we wouldn't be talking about five years;  
7 and we may not even be talking about the crime of arson.

8 The people who were there that night deserve a lot of  
9 credit for how they reacted. The club was prepared for  
10 something like this. There was no panic. The fire was put  
11 out quickly. And the club was evacuated calmly and  
12 efficiently. And everyone should be commended for that.

13 Another reason the government is advocating for a  
14 five-year sentence here is the motivation for this crime.  
15 Now, as we indicated, and as I will tell the court, the  
16 balance of the evidence here indicates that this was a hate  
17 crime, that the defendant had an anti-gay bias, and that was  
18 why he did what he did. And there are specific reasons to  
19 support that, which we've outlined in our memo. The  
20 defendant, to a confidential witness, has made statements,  
21 general statements expressing hostility towards  
22 homosexuality.

23 And he made very specific admissions to another witness,  
24 someone he was close to, someone who was not an informant of  
25 any kind, just a witness in the case. And in explaining what

1 he did, in his words, not someone else's words, in his words,  
2 he said he, "Burned a gay club because what these people are  
3 doing is wrong."

4 Now, as the court sees in the papers, the government is  
5 not advocating for the specific enhancement under Chapter  
6 3(a), because frankly it's moot in this particular case.  
7 That enhancement would not result in a sentence above what  
8 we're already asking for, a sentence of 60 months. And so to  
9 avoid any appeal issues and that sort of thing, we're just  
10 not asking the court to impose the specific factor. But  
11 nonetheless, the court should be mindful of the evidence in  
12 the case.

13 Now, there's some discussion in the defense papers about  
14 why this case is here in federal court. And I can tell the  
15 court why it's here. And that's because of the seriousness  
16 of this offense, all of the things that I've just outlined,  
17 is why this case is in federal court. As indicated by the  
18 defense, the standard range that the defendant was facing in  
19 King County Superior Court, as he was initially charged, was  
20 21 to 27 months. The sentence here in federal court is more  
21 than double that, which the government believes is much more  
22 appropriate than the sentence in state court.

23 Not only is it a longer sentence, but the supervision --  
24 and this is a key component in this particular case -- the  
25 supervision that will follow the defendant's release from

1 prison, we would submit, is much more arduous here in federal  
2 court.

3 And I commend the probation office for identifying two  
4 conditions in particular that we strongly support. And that  
5 is that when the defendant is released and is put on three  
6 years of supervision, that he be mandated to engage in  
7 whatever recommended mental health and substance abuse  
8 treatment the probation office deems appropriate. Because it  
9 is clear, and I think both parties agree on this point, that  
10 mental health and/or substance abuse problems contributed,  
11 not only to this crime, but to really the out-of-control  
12 conduct that the defendant was engaged in for about a year,  
13 before it culminated on New Year's Eve at Neighbours.

14 Now, as I indicated, some of the victims of this offense  
15 are here in the courtroom and I wanted to identify two of  
16 them. Mr. Steven Tracy is here. He was the manager at  
17 Neighbours, and along with others, is responsible for the  
18 outstanding handling of this event. We also have an employee  
19 of the club, Shawn Knittel, who is the gentleman that  
20 submitted the letter to the court that the court referenced  
21 having reviewed. And Mr. Knittel would like to speak to the  
22 court. And I would ask the court to permit him to do so at  
23 the time of this hearing that the court deems appropriate.

24 Mr. Knittel's letter expressed feelings that I think  
25 others that were there at the club must share. One can only

1     imagine the emotional visceral reaction that someone would  
2     have had to this event, that was at the club that night. And  
3     I appreciate that and understand that. And so when we read  
4     things like, you know, five years is not enough time, this  
5     should be 750 counts of attempted murder, I think we can all  
6     appreciate that sentiment. Now, that sentiment and perhaps  
7     some of that common-sense logic doesn't always translate into  
8     what is legally cognizable and what crimes can be charged in  
9     court. But we want to acknowledge that very reasonable and  
10    understandable reaction.

11       And let me conclude by addressing one issue that the  
12    defense I think alluded to in their papers and mentioned to  
13    me before the hearing. And I want to be very clear about  
14    this. There is some concern that the government may be  
15    breaching the plea agreement, and really they haven't used  
16    that word, but I just want to be very clear to this court in  
17    our sentencing memorandum and in my remarks today, we are  
18    sticking with our recommendation in the plea agreement. We  
19    are recommending a 60-month sentence.

20       And there is some confusion, I think, that was caused by  
21    using terms like "upward departure" in my sentencing  
22    memorandum, and I don't know what message was conveyed to the  
23    court by that. I'm confident that it was clear that we were  
24    advocating for a 60-month sentence, which was the agreement  
25    in the plea agreement. But I just wanted to reaffirm that to



1 allay any concerns the defense may have, and make sure the  
2 court understood clearly the government's position here.

3 And with that, that's all I have to say this morning, Your  
4 Honor.

5 THE COURT: Thank you, counsel. Could we have  
6 Mr. Knittel take the podium?

7 Good morning. If you would spell your last name.

8 MR. KNITTEL: Yes, it's K-N-I-T-T-E-L.

9 THE COURT: And I did read the three-or-four-page  
10 letter you submitted. Thank you for submitting it. What  
11 else would you like to say today?

12 MR. KNITTEL: I just want to say that in coming here  
13 today to address the court, I stand before you as someone  
14 that is a community leader and organizer in our community,  
15 someone that oftentimes is a spokesperson for that community.  
16 Neighbours Nightclub has been a part of a community of people  
17 that has seen oppression for decades. Neighbours has been  
18 around for three of those decades. That's where we organize.  
19 It's more than just a dance club. It's more than just a bar.  
20 It's where people have birthdays. It's where people have  
21 anniversary parties. It's where we raise money to sustain  
22 our services.

23 The individuals that were in the nightclub that night,  
24 among that 750, were some of our most gifted, talented  
25 leaders. When you take into account -- while every life is

1 important -- but when you take into account some of the  
2 people that were in there, I think that that's something that  
3 has to be stated. There are individuals that are just really  
4 irreplaceable to us. And so that adds to it.

5 Where the community was very much affected by this is not  
6 only was it a blatant attack on our lives, you also have the  
7 feeling of, well, is this going to happen again? And people  
8 start to withdraw and get very strange and very scared from  
9 all of this. And it leads to kind of a disruption of the  
10 whole community. It's not just a bar culture, like some  
11 people might think. So you have a much greater impact than  
12 just that we saved everybody from getting murdered,  
13 basically.

14 I do have to say, though, we got everybody out of there so  
15 fast, half of the nightclub was outside in the alley and  
16 didn't even know why they were out there. It was so skilled.  
17 And I'm very, very proud of that, because we read around the  
18 world hundreds of people burn in fires like these. But, you  
19 know what, if you look at the worst nightclub fires around  
20 the world, it's not arson, it's pyrotechnics, it's bad  
21 wiring.

22 This is someone who came down there -- when you go to set  
23 arson, you have a choice, on any building, to set that  
24 building on fire with people in it, or set that building on  
25 fire without people in it. This individual chose to do that

1 on our busiest night of the year. I think that that right  
2 there is way more than a five-year sentence. I'm actually  
3 disgusted by the five years as the maximum -- or the minimum,  
4 I guess. I know that members of the community have expressed  
5 to me that they wanted me to come here today and say that.  
6 People are sickened by that number. You read what I wrote, I  
7 don't want to repeat everything. But I stand by that  
8 statement.

9 Having said that, I do think that the Seattle Police  
10 Department and the FBI, all the work that everybody has  
11 done -- there were some disagreements along the way, but at  
12 the end of the day we all worked together as just one city,  
13 one community, and I have to say that we're happy with all of  
14 that.

15 And thank you for letting me address the court today.

16 THE COURT: Thank you for your comments.

17 All right. Mr. Swift.

18 MR. SWIFT: Thank you, Your Honor. I want to begin  
19 in three areas. First, we join the United States in  
20 recommending a 60-month sentence. We know the court can  
21 agree with probation that 60 months is the guideline sentence  
22 in this case, that's the recommended guideline sentence  
23 because of the mandatory minimum. The scored score was  
24 lower, but in cases where it is higher, the score goes to 60.  
25 So the question before this court is to whether to impose --

1 the defense agrees that you cannot impose a sentence below  
2 60 months, that the law requires you in this case to impose a  
3 60-month sentence at a minimum. The question before the  
4 court today is whether to impose anything higher, and we  
5 think that for the following reasons the court should not do  
6 that.

7 (A) The recommendation of the parties; (B), to the extent  
8 that the United States has argued that a hate-crime  
9 motivation is here, we think that to impose based on that, to  
10 vary or depart above the guideline sentence, either because  
11 of disagreement with the sentence, or because of the belief  
12 that the 3500 factors would require a higher sentence, would  
13 be completely improper by the court. One, the guidelines  
14 require a hearing, and we have not had a hearing. And,  
15 secondly, the statements relied on, as we've cited in our  
16 brief, have been found by other appellate courts not to be  
17 reliable.

18 What we simply have is an out-of-court statement -- and  
19 while evidence, the Rules of Evidence do not apply here, it's  
20 from an anonymous person. Statements simply contained in  
21 probation reports, or such -- that the court does not even  
22 have the 302 into evidence from which they were taken, or  
23 context, and the defense has no opportunity to address,  
24 because we have no idea when it was made, who it was made to,  
25 or what circumstances it was made under, I simply have

1 quotes -- are not reliable on which to base any departure  
2 above the 60 months, Your Honor. And to rely on such would  
3 be improper, in the defense's opinion.

4 Secondly, the factor inside the guidelines, also as noted  
5 by the government, with regards to the risk posed, is already  
6 imposed in the guidelines. And we would note that to the  
7 extent there is some disagreement, that the 60-month  
8 mandatory is, again, and I agree with the government, changes  
9 the guidelines, in this case increases it by more than  
10 18 months. So for those purposes we would say that again  
11 there would be no argument to depart from the guideline  
12 sentence of 60 months based on the risk posed.

13 The last area, Your Honor, is the 3500 factors themselves.  
14 And here we would draw you to the defendant's mental health  
15 analysis, and I think where the parties agree. The parties  
16 agree that Mr. Masmari is an alcoholic, sir. He hasn't been  
17 drinking very long, but he's been drinking very badly. He  
18 has demonstrated a rapid decline. I would note in the mental  
19 health report that the only reason Mr. Masmari is not rated  
20 as severe is because he's been drinking for so short a period  
21 of time he has yet to suffer the health consequences that are  
22 required for the severe; in other words, his liver failing,  
23 that sort of thing, that we typically look at in severe  
24 alcoholism. Other than that, he displays everything.

25 We agree, in fact, I think the court should go farther and

1 find that he has a severe problem, that the court should  
2 order inpatient treatment as part of this, or suggest to the  
3 prison system that he receive inpatient. I think it's  
4 extremely important that he receive such treatment, because  
5 that treatment -- and this is where I agree with the  
6 government -- that treatment is absolutely essential to his  
7 rehabilitation. His criminal conduct coincided with his  
8 entrance into alcoholism. And I think it is a fair inference  
9 for someone of this age, who had not had it previously, that  
10 if we can cure the drinking, we can rehabilitate the person.  
11 Prison has little rehabilitation left, but this is one area,  
12 and I think it would actually serve the purposes.

13 So, for the reasons we set forth, one, we urge the court  
14 to not only find that he has a severe alcohol and drug  
15 problem, he's also abused drugs, and I think it would be  
16 appropriate to receive the treatment, I would say he's  
17 primarily an alcoholic, and find that he has a severe problem  
18 and order appropriate treatment as part of that. Number two  
19 is to abide by the sentencing -- by the guideline  
20 recommendations. And that's all that I have, Your Honor.

21 Mr. Masmari -- one last note. Mr. Masmari has already  
22 made his statement of responsibility. That statement was  
23 basically given to me. He told it to me over a period of  
24 time, then I wrote it up, because while Mr. Masmari speaks  
25 English, the reading and writing -- in fact every document in

1 this case I've read to him. He speaks English fairly well,  
2 but as someone who studied it, writing it is a little more  
3 difficult. And so he helped me prepare it. I wrote it out  
4 for him. Then I read it to him and he signed it.

5 Under those circumstances Mr. Masmari stands on that  
6 statement and does not desire to make a statement to the  
7 court.

8 THE COURT: Thank you, counsel. One question before  
9 you step down.

10 MR. SWIFT: Certainly.

11 THE COURT: I understand that restitution is yet to  
12 be determined. Do you know if we have a number at all?

13 MR. SWIFT: I have not received a number. And I  
14 agree on the law, restitution -- this court is required to  
15 order restitution. I don't have a number, however. I  
16 suggested \$1,000, in the absence of information.

17 THE COURT: All right. Thank you.

18 MR. GREENBERG: Your Honor, I can address that, too,  
19 I was intending to do that a little bit later. We are still  
20 waiting on the specific information. So we were going to ask  
21 the court, as to the restitution, to set a hearing out  
22 90 days. And we'll try to get more specific information as  
23 to that.

24 THE COURT: All right. Thank you, Mr. Greenberg.  
25 Counsel, let me take a moment and check with our probation

1 officer, Mr. Cowan. Thank you very much for your presentence  
2 report. Having heard from counsel, is there anything else  
3 you would like to add this morning?

4 THE PROBATION OFFICER: Just briefly, Your Honor, of  
5 course I've joined in the parties' recommendation for a term  
6 of imprisonment of 60 months, which is the mandatory minimum.  
7 I did that with a fair bit of reservation, and in part  
8 because of the very close call, whether or not to apply the  
9 hate-crime guideline. But in talking with both counsel,  
10 understanding that proof beyond a reasonable doubt was  
11 required, and the kind of uncertainty of the nature of this  
12 witness caused us to not apply that guideline.

13 Another factor that weighed into the guideline  
14 calculations themselves was a very close call whether to  
15 apply, in the arson guideline, the cross-reference involving  
16 if death was intended to be caused, or serious bodily injury  
17 is intended to be caused. The guidelines allow for a  
18 cross-reference to the most analogous guideline.

19 If you did that and applied a second degree murder  
20 guideline, you'd have a base offense level of 38. You'd  
21 subtract 3 because it was an attempt under 2X, I believe 1.1,  
22 then an additional level for acceptance of responsibility.  
23 The guideline range could be 121 to 151. But we didn't go  
24 that way. It didn't seem contemplated. And the defendant's  
25 intent in this case is somewhat of a mystery, given the



1 absence of the cooperating witness, as Mr. Swift has pointed  
2 out. Those factors led us to join in the parties'  
3 recommendation. But I think it was a very close call and  
4 there are very many, very many aggravating circumstances.

5 As Mr. Knittel pointed out, this case could have been a  
6 horrible, horrible tragedy in another realm. But there are  
7 aggravating circumstances that may not have been fully  
8 fleshed out in my report.

9 THE COURT: Thank you very much.

10 Counsel, you're aware there is basically a three-step  
11 process of imposing any federal sentence. Number one, the  
12 court has to calculate the accurate guideline range for the  
13 offense of conviction; secondly, the court should look at any  
14 traditional departure or variances involved; and, finally,  
15 the court is to look at all sentencing factors, specifically  
16 those delineated in 3553(a); and then weighing and balancing  
17 all those to come up with a sentence that is appropriate  
18 after considering, as I've indicated, every single one of  
19 those factors, a sentence that is not more than necessary to  
20 effect sentencing.

21 Step one, in this particular case the defendant pled  
22 guilty to the crime of arson. That has three elements. One,  
23 he knowingly and maliciously damaged or destroyed a building  
24 or other real property; second, that the building or real  
25 property was used in interstate commerce, or in any activity

1 affecting interstate commerce; and, finally, that defendant  
2 used means of fire or an explosive to damage the building.

3 As both sides have indicated in their sentencing  
4 memoranda, there has been disagreements as to whether or not  
5 the court can look at this as a hate crime in terms of adding  
6 the enhancement. Both sides are asking the court not to do  
7 so, for the reasons basically articulated by Mr. Swift here  
8 in court, that we have an out-of-court statement, we've not  
9 had any kind of evidentiary hearing to have that tested or  
10 contested in any way, and that we basically have a lack of  
11 information or lack of evidence as to what happened to be  
12 able to make that leap in terms of the enhancement.

13 The government also requests that the court not consider  
14 that as an enhancement, also making the additional argument  
15 it probably wouldn't make a difference in calculation of the  
16 guideline range, because it would get us only up to basically  
17 pretty much the same range as what the government is  
18 requesting in their sentence of five years, 60 months.

19 Counsel, the court is not going to use that enhancement,  
20 for the reasons indicated by Mr. Swift. But I think that  
21 common sense dictates, as Mr. Greenberg indicated, that what  
22 we don't know for sure is the motivation behind all of this.  
23 But common sense tells us exactly what was on Mr. Masmari's  
24 mind at the time he set this fire.

25 The parties have agreed that the court is to consider the

1 fact that the defendant's actions created a substantial risk  
2 of injury or death to someone as an aggravating factor, and  
3 that's what gets us to the current range of 37 to 46 months.  
4 He falls in Criminal History Category 1. The total offense  
5 level would be, I believe, 21, calling for an advisory range  
6 of 37 to 46 months. However, because of the mandatory  
7 minimum of 60 months, the court may not impose anything less  
8 than 60 months in this particular case.

9 We all agree on the guideline calculations. The  
10 recommendation by both sides is for the court to impose a  
11 60-month sentence for all the reasons indicated in your  
12 sentencing memos and also articulated here in court.

13 In looking at the other factors that remain, the court is  
14 to consider the nature and circumstances of the offense and  
15 the history and background of the defendant. The nature of  
16 this particular offense is an extremely troubling one,  
17 extremely serious one. The circumstance of this offense are  
18 greatly concerning.

19 As Mr. Knittel so eloquently stated, both in his written  
20 letter to the court and his comments here this morning, but  
21 for the actions of some very quick thinking folks, we could  
22 have had a tremendous tragedy that particular night.

23 My understanding is that the fire was set, and the gas can  
24 still containing more than half of its contents, the gas can  
25 was set fairly close to where the fire started. If that fire

1 was not put out as quickly as was done in this particular  
2 case, as efficiently, by the heroic actions of the people  
3 that were present, and that gas can explodes in any way, the  
4 resulting panic alone would have caused tremendous potential  
5 injury or death to many of the 750 patrons who were inside  
6 that building.

7 This is also troubling for another reason. From the  
8 defendant's perspective I get, I was in an alcoholic  
9 blackout. I don't remember much of what was going on. Yet  
10 looking at the circumstances of this offense, this was not a  
11 spur-of-the-moment type of crime. It took very careful  
12 planning and forethought, obtain the gas can, fill it with  
13 gasoline, smuggle it into the club, execute the plan, go to  
14 the stairwell, light the fire, and then exit as quickly as he  
15 can to save himself, leaving everybody else in there to fend  
16 for themselves.

17 We're talking about the busiest night of the year. As  
18 Mr. Knittel said, the majority of nightclub fires start for  
19 many different reasons, pyrotechnics is one, bad wiring. And  
20 even in those situations when they start accidentally, we've  
21 seen the results of what happens if that fire is not put out  
22 as quickly as this one was.

23 When one looks at the circumstances, the history and  
24 characteristics of the defendant, it's also concerning. Yes,  
25 I understand he falls in criminal history category of 1. But

1 I believe that his contacts with law enforcement in the past,  
2 the way he has reacted when confronted in the past, the  
3 incidents of harassing other people -- one witness even  
4 described him, I believe, as someone who had been terrorizing  
5 the neighborhood, arrested on multiple occasions for assault,  
6 being in a vehicle while intoxicated, violating a domestic  
7 violence no-contact order.

8 I don't have any doubt that the criminal conduct in this  
9 case was fueled by that substance abuse, particularly  
10 alcohol, and perhaps even mental issues or both. But the  
11 court feels that the community does need to be protected from  
12 the defendant in the future and will impose certain mental  
13 health and substance abuse conditions as part of the  
14 supervised release, to try to deal with those issues.

15 The court is also concerned and should be focusing on the  
16 3553 factors, that the sentence imposed be a reflection as to  
17 the defendant's own -- let me restate that. The court is  
18 concerned that in this particular case what I get from the  
19 defendant is not even an acceptance of the consequences of  
20 what he's done. Yes, I read the statement of responsibility  
21 that he submitted. I find it incredible. As I said, common  
22 sense and looking at all the circumstances that led up to  
23 this particular offense, it is not believable that he would  
24 have been in an alcoholic blackout. There was way too much  
25 planning both before and after for that to really be the

1 case.

2 Counsel, after considering all of the 3553(a) factors that  
3 are present in this particular case, the court will impose  
4 the following sentence: He will be placed on three years of  
5 supervised release, once he is released from custody. The  
6 court finds he does not have the financial ability to pay any  
7 fine, therefore the fine will be waived. Restitution is  
8 undetermined at this point in time. We will set a hearing  
9 approximately 90 days out to see if the parties can agree on  
10 restitution. If not, the court can make a determination at  
11 that time as to what the restitution amount should be. The  
12 only other monetary penalty imposed is the mandatory special  
13 assessment of \$100.

14 That only leaves the amount of custodial time to impose.  
15 The recommendation by both sides is a five-year sentence. In  
16 this particular case Mr. Cowan from probation indicated that  
17 if one looks at the potential cross reference here to this  
18 particular offense, and I'm looking at the Section 2K1.4.  
19 Arson, property damage by use of explosives. That reads, "If  
20 death resulted, or the offense was intended to cause death or  
21 serious bodily injury, apply the most analogous guideline  
22 from Chapter 2." That is the offenses against person  
23 chapter.

24 And Mr. Cowan indicated doing that would put us into the  
25 attempted murder or even murder second guideline range.

1 Looking at Mr. Masmari's guideline range here, it could  
2 potentially very easily have been in the neighborhood of 120  
3 to 150 months.

4 The court also feels in this particular case that there  
5 are grounds for departure from the recommended sentence.  
6 Looking at 5K2.0, grounds for departure, (a)(2) talks about  
7 departures based on circumstances of a kind not adequately  
8 taken into consideration.

9 And Section (b) under (2) reads, "A departure may be  
10 warranted in an exceptional case in which there is present a  
11 circumstance that the Commission has not identified in the  
12 guidelines but nevertheless is relevant to determining the  
13 appropriate sentence."

14 It goes on to indicate that, "Departure may be warranted  
15 in an exceptional case, even though the circumstances that  
16 form the basis for the departure is taken into consideration  
17 in determining the guideline range, if the court determines  
18 that such circumstance is present in the offense to a degree  
19 substantially in excess of, or substantially below, that  
20 which ordinarily is involved in that kind of offense."

21 The elements of arson, as the court has indicated earlier,  
22 using fire to cause damage to a building, and taking into  
23 account that substantial injury or death could have resulted,  
24 in this case the court finds that this is that exceptional  
25 case based on the number of people present inside that

1 building, based on the fact that it was New Year's Eve, the  
2 busiest night of the year, based on the fact that if that  
3 fire had been just a few more seconds away from being  
4 uncontrolled, the court has no doubt that serious injury or  
5 death would have occurred to patrons of that club.

6 The court is satisfied that this is the exceptional type  
7 of case that merits a departure. The court will not impose  
8 the 60 months recommended but will impose something more  
9 closely to the range discussed for injury to persons. The  
10 court will impose 120 months of custodial time, with credit  
11 for all time served in this cause number up until now.

12 Mr. Swift, are you requesting the court make a  
13 recommendation to BOP about placement at a particular  
14 facility?

15 MR. SWIFT: No, sir.

16 THE COURT: Counsel, the only other portion of  
17 sentencing are the conditions of supervised release. The  
18 court will impose the five conditions that are set out in  
19 Mr. Cowan's presentence report. They will be imposed exactly  
20 as set out in that presentence report. Let me briefly  
21 summarize them for purposes of our hearing.

22 Defendant will participate, if so instructed by probation,  
23 in a program approved by them for treatment of addiction,  
24 drug dependency, or substance abuse. He is to be abstain  
25 from using any alcohol or any other intoxicants during the



1 entire period of supervision.

2 No. 2, he will provide probation with access to all  
3 requested financial information, including any authority  
4 needed to conduct credit checks or obtain copies of any  
5 income tax returns filed in the future.

6 No. 3, he will participate, if so directed in a mental  
7 health program, if approved by U.S. Probation.

8 No. 4, has to do restitution. As indicated we will  
9 schedule a hearing for approximately 90 days from today.

10 And No. 5, he will submit any property, his person, his  
11 offices, safety deposit boxes, vehicles, to searches  
12 conducted by U.S. Probation or any other law enforcement  
13 officer, at a reasonable time in a reasonable manner based  
14 upon reasonable suspicion.

15 That will be the sentence.

16 MR. GREENBERG: Your Honor, I have a judgment, if I  
17 can show it to counsel.

18 May I approach, Your Honor?

19 THE COURT: You may. Counsel, two final matters for  
20 the record.

21 No. 1, as the proposed judgment form accurately reflects  
22 the sentence imposed by the court, it's been dated and signed  
23 and it may be filed.

24 No. 2, the restitution hearing is set for October 23rd at  
25 11:00 a.m. right back in this courtroom. If the parties are

1 able to agree on a restitution amount before that, prior to  
2 that date, please inform us as quickly as possible and we can  
3 strike the hearing.

4 And, finally, counsel, I believe it was paragraph 13 of  
5 the plea agreement contained a waiver of appeal. And it said  
6 that as part of the plea agreement and on the condition the  
7 court imposed a custodial sentence within or below the  
8 guideline range, or the statutory mandatory minimum,  
9 defendant waives the right to appeal. Since the court  
10 departed from that, and went above the guideline range, the  
11 defendant has the right to appeal his sentence.

12 Mr. Masmari, if you wish to appeal the sentence the court  
13 has imposed, or any portion of the sentence, all you've got  
14 to do is notify your counsel. They know fully well how to  
15 start that process right away. You can do it without them,  
16 simply notify the clerk of our court you wish to appeal the  
17 sentence or any portion of it. The critical thing is if you  
18 fail to file your notice of appeal within 10 business days of  
19 today -- today being the 31st of July 2014 -- you may forever  
20 give up the right to pursue any appeal of the sentence. Do  
21 you understand?

22 THE DEFENDANT: Yes, I do understand.

23 THE COURT: Anything further from the government?

24 MR. GREENBERG: No, Your Honor.

25 THE COURT: Anything further from the defense?

1 MR. SWIFT: No, Your Honor.

2 THE COURT: Gentlemen, thank you. We'll be at  
3 recess.

4 (The proceedings recessed.)

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## C E R T I F I C A T E

I, Debbie K. Zurn, RPR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 26th day of August, 2014.

*/s/ Debbie Zurn*

DEBBIE ZURN  
OFFICIAL COURT REPORTER